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No. 03-1338

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

SANTA BARBARA NEWS-PRESS, et al.,
Petitioners,

v.

LEONARD M. ROSS,
Respondent.

On Petition for a Writ of Certiorari
to the California Court of Appeal, Second District

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent does not contest the importance of the independent-review or public-figure issues presented here. Nor does he dispute the need for uniformity in these critical areas of First Amendment law. While Respondent does take issue with Petitioners' assertions that the California Court of Appeal's rulings conflict with this Court's and other courts' precedent – as well as with various alleged "misstatements and omissions of fact and law" in the Petition for Certiorari Br. in Opp. at 4 – Respondent's contentions do not withstand scrutiny. This Court should grant review to resolve the confusion over the constitutional issues presented and to reverse the California court's erroneous decision imposing a multi-million dollar judgment on a regional newspaper.

ARGUMENT

I. Respondent Does Not Provide Any Persuasive Reason To Forego Resolving Whether Appellate Courts Must Independently Review A Jury's Finding That An Allegedly Defamatory Statement Was Not Substantially True.

A. State And Federal Courts Are Divided On This Issue.

Respondent contends that the four cases Petitioners cite at Pet. for Cert. at 11-12 independently reviewing jury findings of falsity do not conflict with the California decision here because in those cases falsity was "critical to a determination of malice or state of mind." Br. in Opp. at 15. But this argument misunderstands libel law and misconstrues the holdings in those cases. The requirement that a libel plaintiff prove that the challenged statements were "false" is entirely distinct from the requirement that the plaintiff prove fault on the part of the reporter or publisher. *See, e.g.*, Robert D. Sack,

Sack on Defamation § 2.1, at 2-3 (3d ed. 2003). It is true that these two legal requirements are related; a plaintiff must prove both to prevail in a libel suit. But the elements operate independently. Merely proving that the press acted negligently or recklessly does not necessarily mean that that the report was false. *See, e.g., Liberty Lobby, Inc. v. Dow Jones & Co.,* 838 F.2d 1287, 1294 (D.C. Cir. 1988) (separating falsity from fault).

Nor are the four cases applying independent review distinguishable from this one on the ground that those cases reviewed the record for "falsity," rather than an absence of "substantial truth." *See* Br. in Opp. at 15. There is no difference between those inquiries; under the common law and First Amendment, the test for falsity *is* whether the statement lacked "substantial truth." *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 516 (1991). That is why the First Circuit in *Veilleux v. National Broadcasting Co.,* 206 F.3d 92 (1st Cir. 2000), noted that "[f]alsity overlooks minor inaccuracies and concentrates upon substantial truth," and independently reviewed the record for substantial truth. *Id.* at 108. The D.C. Circuit and the Michigan Supreme Court did exactly the same thing in the cases cited in the Petition. *See Liberty Lobby,* 838 F.2d at 1295 (independently determining that plaintiff did not demonstrate falsity because statements were "substantially true"); *Rouch v. Enquirer & News,* 487 N.W.2d 205, 214-15 (Mich. 1992) (same). The fact that the Nebraska Supreme Court did not explicitly mention the substantial-truth standard merely shows that it was not necessary to fine-tune the inquiry in that case; the court independently concluded that there were not any inaccuracies at all. *See Deaver v. Hinel,* 391 N.W.2d 128, 135 (Neb. 1986) (challenged statements were not false because they "state[d] the truth"). Accordingly, the holding below squarely conflicts with several decisions from federal appellate courts and state courts of last resort.

B. The California Court of Appeal's Ruling Contravenes This Court's Precedent.

While Respondent appears to acknowledge that the issue of falsity "gains the constitutional importance warranting independent review" in libel cases involving public figures (where plaintiffs must prove actual malice), Br. in Opp. at 15 he argues that such review is not constitutionally required in cases involving private figures (where mere negligence is needed to establish fault). *See id.* at 1, 7-13. Respondent's latter position is incorrect. The First Amendment requires independent review whenever a factual issue marks "the limits of [an] unprotected category of speech." *Bose Corp. v. Consumers Union,* 466 U.S. 485, 505 (1984); *see also* Pet. for Cert. at 13. And this Court squarely has held that falsity marks such a boundary regardless of the status of the plaintiff: "even a private figure plaintiff cannot recover damages [for libel] without also showing that the statements at issue are false." *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 768-69 (1986); *see also Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974) (requiring falsity in private-figure case). The First Amendment, therefore, requires independent review of falsity in every libel case.

C. This Case Is An Excellent Vehicle For Resolving This Issue.

Neither of Respondent's attempts to cast this case as an unsuitable vehicle for resolving the independent-review question presented has merit.

First, Respondent is incorrect in suggesting (Br. in Opp. at 13) that the absence of actual malice here somehow deflates the importance of independently reviewing whether the statements at issue are false. Even assuming that Respondent was a private figure and thus did not need to prove actual

malice, falsity is just as much a part of a private-figure libel case as it is a part of a public-figure case. *See supra* part I.B.

Second, contrary to Respondent's suggestion (Br. in Opp. at 6 ¶ 5), the Court of Appeal found the evidence of substantial truth to be "ambiguous" and "conflicting" (App. 21a n.6) – thus showing that the standard of review dictated the outcome of the falsity issue on appeal. The Court of Appeal acknowledged, for example, that federal law enforcement agencies investigated Petitioner in the early 1970's for a potential violation of the Hobbes Act, as well as for alleged extortion, pistol-whipping, and kidnapping of his business partner. Pet. App. 22a. It also recognized, contrary to Respondent's suggestion (*see* Br. in Opp. at 5-6 ¶ 4), that the 1976 investor-fraud investigation began at the SEC and that the SEC "looked at" Petitioner in the early stages of that inquiry. *Id.* These facts and others demonstrate that the "gist" or the "sting" of Petitioners' allegedly defamatory statements – that federal authorities had investigated Respondent several times for alleged business improprieties – was justified. *See Masson,* 501 U.S. at 517 (quotation omitted).

Indeed, the Court of Appeal went so far as acknowledge at one point that the challenged statements here were "supported by . . . reasonable explanations of the evidence" because Petitioners had "conflicting information about whether [Respondent] was part of the 1976 investigation and to what extent." App. 41a. The court nevertheless also held that it "was reasonable for the jury to conclude" that Respondent was *not* investigated because he was not "the 'target' or the 'subject' of the inquiry." App. 24a-25a. The deference the Court of Appeal had to employ to uphold the jury's finding on this constitutional fact confirms that the finding could not survive independent review. A plaintiff cannot recover for libel when "the factfinding process [is] unable to resolve conclusively whether the speech is true or false." *Hepps,* 475

U.S. at 776-77. That is exactly what the Court of Appeal found to be the case here.

II. Respondent Does Not Provide Any Persuasive Reason To Forego Resolving Whether Individuals Who Own Or Control Businesses In Pervasively Regulated Industries Are "Public Figures" For The Limited Purpose Of Media Coverage Of Their Business Dealings.

A. There Is Substantial Disagreement In The Lower Courts Concerning This Issue.

Respondent does not dispute that public-figure law is in such disarray that "few generalizations can safely be promulgated." Br. in Opp. at 18. Nonetheless, Respondent attempts to take refuge from this chaotic state of affairs in the maxim that "our society is a blend of diverse individuals." *Id.* at 1. But surely this truism does not make it impossible to categorize and compare various courts' rulings. When one does that in the context of influential figures in strictly regulated industries, a clear First Amendment conflict emerges regarding the public-figure status of such persons. While courts such as the one here have held that a "prominent business person" seeking a substantial ownership share in a heavily regulated business is not a limited-purpose public figure unless he "thrust[s] himself" into the public limelight, App. 76a, other courts such as the Fifth Circuit have held that such a person "cannot erase his public-figure status by limiting comment and maintaining a low public profile." *Trotter v. Jack Anderson Enters. Inc.*, 818 F.2d 431, 436 (5th Cir. 1987); *see also* Pet. for Cert. at 19-21 (citing other conflicting cases). It is this conflict to which Petitioners – now joined by numerous leading media entities that investigate and report on business issues a regular basis – ask this Court to bring some semblance of order. *See* Media Entities Amicus Br. at 11-14. This Court can, and should, do so.

B. The Court Of Appeal's Ruling Contravenes This Court's Precedent.

Respondent's defense of the Court of Appeal's public figure ruling is ineffective. It goes without saying that none of the California cases Respondent cites are binding on this Court, and no decision of *this Court* ever has held that an influential business person must enter into a pre-existing public "debate[]" concerning a company-specific public controversy in order to be a limited-purpose public figure. Br. in Opp. at 6 ¶ 6, 18-19. Instead, this Court has held that it generally is sufficient if a person has voluntarily "assumed an influential role in ordering society." *Gertz,* 418 U.S. at 345 (quotation omitted). This broader protection is necessary because the First Amendment is designed not only to protect the press's ability to report on existing controversies but also to "gather information" and to "seek[] out" stories that affect the public. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 576 (1980); *see also United States v. Caldwell,* 408 U.S. 662, 722 (1972) (Douglas, J., dissenting) ("The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work.").

In modern times more than ever before, individuals who own or control heavily regulated businesses exert great influence over society, thereby making it the media's duty to scrutinize such individuals. When a person voluntarily seeks what is presumed to be a controlling interest in a pervasively regulated and regionally prominent business, as Respondent did here, he assumes "the risk of closer public scrutiny than might otherwise be the case," *Gertz,* 418 U.S. 345, and renders himself a public figure for the purposes of his business dealings.

C. This Case Is An Excellent Vehicle For Resolving This Issue.

Contrary to Respondent's suggestions, there is not any procedural or factual impediment to considering the public figure question presented here.

First, Petitioners did not waive their right to raise the public figure issue here by declining in the second trial to challenge the Court of Appeal's prior private figure ruling. *See* Br. in Opp. at 2. Such a challenge would have been futile, for under the law-of-the-case doctrine, the trial court in the second trial was bound by the Court of Appeal's determination in the first appeal that Respondent was a private figure. *See* Pet. App. 14a-15a. Nor is it of any moment that in the second appeal, the Court of Appeal determined that the law of the case doctrine foreclosed reconsideration of it prior public figure ruling.

Petitioners challenge the Court of Appeal's determination in the first appeal that Respondent was a private figure. *See* Pet. App. 72a-77a. As the Petition for Certiorari noted, once all state-court proceedings are final, a party is entitled to challenge in this Court any adverse interlocutory ruling on a federal issue during those proceedings, regardless of whether it became the law of the case at some point. *Hathorn v. Lovorn,* 457 U.S. 255, 262 (1982); Pet. for Cert. at 19 n.2.[1] Accordingly, Petitioners have every right to challenge the Court of Appeal's initial resolution of the public figure issue at this time.

Second, Respondent's filing of "a Rebuttal of Rebuttable Presumption of Control" with federal regulators (Br. in Opp. at 4-5 ¶¶ 1 & 3, 16) does not diminish the strength of

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[1] Petitioners also note that they argued not only in their initial petition for review to the California Supreme Court but also in their second such petition that Respondent was a private figure.

Petitioner's argument that Respondent's potential influence over a pervasively regulated business rendered him a public figure for the limited purpose of reporting on his business affairs. As Respondent acknowledges, federal and state regulations presumed that his increase in ownership of the Santa Barbara Savings and Loan (SBSL) to 24.9% would give him control of that institution. Br. in Opp. App. 4; 12 C.F.R. § 574.4(b). Federal law deems such an ownership interest so important that it requires a federal banking agency to "conduct an investigation of the competence, experience, integrity, and financial ability" of the applicant and to report on whether it approves of the applicant's plans. 12 U.S.C. § 1817(j)(2)(B)(i) & (C). In the course of this investigation, the federal agency must seek the input of the affected state as well as the public. 12 U.S.C. § 1817(j)(2)(A) & (D).[2] And, most important, the federal agency has a duty to investigate such an applicant regardless of whether he seeks to rebut the presumption of control. *See* 12 C.F.R. § 574.4(e)(1)(ii) & (e)(3).

These regulations leave little doubt that Respondent was seeking to become a person of exceptional influence and significance in the savings and loan industry. Indeed, Petitioners' challenged newspaper articles about Respondent merely reported on the issues that federal law already

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[2] The latter subsection provides:

> Upon receiving notice of a proposed acquisition, the appropriate Federal banking agency shall, unless such agency determines that an emergency exists, within a reasonable period of time –
>
> (i) publish the name of the insured depository institution proposed to be acquired and the name of each person identified in such notice as the person by whom or for whom such acquisition is to be made; and
>
> (ii) solicit public comment on such proposed acquisition, particularly from persons in the geographic area where the bank proposed to be acquired is located, before final consideration of such notice by the agency . . . .

12 U.S.C. § 1817(j)(2)(D).

instructed the government to investigate and report on in a public manner. This is more than enough to show that Respondent voluntarily subjected himself to public scrutiny regarding his business affairs in the same way that other leading officials in other heavily regulated businesses do.

Finally, as Petitioners have noted, this case is an excellent vehicle for considering the public-figure issue here because the issue is outcome-determinative. Respondent loosely suggests a couple of times that Petitioners "intentionally" published defamatory statements they knew to be false, Br. in Opp. at 1, 11, but the Court of Appeal squarely held that Petitioners did not act with actual malice here. App. 38a-46a. Consequently, Respondent was entitled to recover damages only if he was a private figure. *See* Pet. for Cert. at 17.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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